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No. 04-1146

In The

Supreme Court of the United States

JEFFREY BUBNA,

Petitioner,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, MUNICIPALITY OF ANCHORAGE, PAULA HALEY in her official capacity as the Executive Director of the Alaska State Commission for Human Rights,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alaska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A Ninth Circuit en banc panel ruled that two of the three plaintiffs in this case did not have Article III standing in an earlier federal case raising the same issues presented here. The third plaintiff, who did not participate in the earlier case but who is virtually identical to the other two, joined them in this state court case. He alone has filed the petition for certiorari. Does this petitioner have Article III standing?

2. The plaintiffs raised Federal Constitutional issues in this state court case. The Alaska Supreme Court had already decided these issues in a similar case in 1994. The plaintiffs asked the Alaska Supreme Court to overrule that case, but the court declined, relying on its state law test of whether to reconsider an earlier governing case. The opinion decides only this state law issue. Does this case present a federal issue over which this Court has jurisdiction?

3. The petitioner argues that the Alaska Supreme Court decision below conflicts with decisions of this and other courts on certain Federal Constitutional issues. The Alaska Supreme Court did not rule on any of these issues however; it only applied a state law test and decided not to reconsider a 1994 state case that decided these issues. Does the Alaska Supreme Court case below conflict with decisions from any other courts?

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STATEMENT OF FACTS AND PROCEEDINGS

The petition for certiorari in this case is part of a decade-long attempt by several landlords to have a decision of the Alaska Supreme Court overruled. These landlords seek a declaration that the state and municipal housing laws that prohibit discrimination based on marital status are unconstitutional. App. 4-5. They argue that because their religion considers cohabitation without marriage to be a sin, renting their commercial properties to such couples forces them to commit sin themselves, which violates their rights to free exercise of religion and free speech. App. 4-6.

The landlords seek reversal of the Alaska Supreme Court's decision in *Swanner* v. *Anchorage Equal Rights Com'n*, 874 P.2d 274 (Alaska 1994). In *Swanner*, the court rejected a constitutional challenge to the same statutory provisions brought by Anchorage landlord Tom Swanner. Swanner had a policy of refusing to rent or show property to unmarried couples, based on his Christian religious beliefs. *Id.* at 276-77. After receiving complaints against Swanner, the Anchorage Equal Rights Commission filed proceedings against him and ultimately found that he had engaged in discriminatory conduct. *Id.* at 277. Swanner appealed, asserting that the state and municipal anti-discrimination laws violated his rights to the free exercise of his religion under the United States and Alaska Constitutions. *Id.*

The Alaska Supreme Court found no merit to these claims under either constitution. Applying the test set out by this Court in *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), the court concluded that Swanner's federal constitutional rights had

not been violated, since the challenged anti-discrimination laws are neutral and generally applicable provisions. 874 P.2d at 279-80. The court also applied the more protective requirements of *Sherbert* v. *Verner*, 374 U.S. 398 (1963), which it had previously adopted as a state constitutional measure. *Id.* at 281-82. The court concluded that the challenged laws passed constitutional muster because they furthered a compelling state interest by preventing marital status discrimination, and were narrowly tailored. *Id.* at 282-83. Relying on the same conclusion, the court separately held that the disputed laws would withstand federal review under the strict scrutiny test that Congress had recently enacted in the Religious Freedom Restoration Act of 1993.[1] *Id.* at 280 n.9. This Court declined to review *Swanner* on a writ of certiorari. *Swanner* v. *Anchorage Equal Rights Com'n*, 513 U.S. 979 (1994).

Shortly after the Alaska Supreme Court decided *Swanner*, landlords Kevin Thomas and Joyce Baker filed suit in the United States District Court in Anchorage against Paula Haley in her capacity as the Executive Director of the Alaska State Commission for Human Rights, the Anchorage Equal Rights Commission, and the Municipality of Anchorage. *See Thomas* v. *Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). They asserted that the Alaska and Anchorage anti-marital discrimination laws violated their free exercise rights under the United States Constitution, and sought a declaratory judgment enjoining the state and the municipality from enforcing those provisions. *Id.* Thomas

[1] This Court later found the Religious Freedom Restoration Act to be unconstitutional in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

and Baker are Anchorage landlords whose "situation is nearly indistinguishable from the one [the court] considered in *Swanner*." *Thomas* v. *Anchorage Equal Rights Com'n*, 102 P.3d 937, 945 (Alaska 2004).

The federal district court granted summary judgment to the landlords, declaring that the state and municipal prohibitions of marital discrimination violated their free exercise rights. *See id.* at 941. A divided panel of the Ninth Circuit affirmed this ruling, but the court subsequently granted rehearing en banc and withdrew the panel's opinion. *See Thomas* v. *Anchorage Equal Rights Com'n*, 165 F.3d 692, 697, *withdrawn and reh'g en banc granted*, 192 F.3d 1208 (9th Cir. 1999) ("*Thomas I*"). After rehearing the case, the en banc court vacated the judgment and ordered the landlords' action dismissed. Describing the action as "a case in search of a controversy," the court ruled that the landlords' constitutional claims should not have been decided on their merits because the action was not ripe for judicial review. *Thomas* v. *Anchorage Equal Rights Com'n*, 220 F.3d at 1137-38 ("*Thomas II*"). This Court denied certiorari. *Thomas* v. *Anchorage Equal Rights Com'n*, 531 U.S. 1143 (2001).

Joined by another similarly-situated Anchorage landlord, Jeffrey Bubna, Thomas and Baker refiled their case in the Alaska Superior Court, naming the same defendants. *See Thomas*, 102 P.3d at 942 ("*Thomas III*"). Their case asserted essentially the same violation of free exercise rights that Thomas and Baker had raised in the preceding federal action. *Id.* The landlords also alleged independent violations of their constitutional rights to free speech, and asked the court to overrule the *Swanner* decision. *Id.*; App. 12.

Ruling on cross-motions for summary judgment, the superior court rejected the landlords' claims. *Id.* The Alaska Supreme Court affirmed. The court applied *Swanner* to deny their requested relief under the common law principle of stare decisis. *Id.* at 943. The court considered whether the landlords met the "heavy threshold burden of showing compelling reasons for reconsidering the prior ruling," stating that it will overrule a prior decision "only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent." *Id.* The court carefully examined each element of this standard, and held that while the landlords "strenuously criticize *Swanner's* reasoning and holding in many respects, [they] do not convincingly show good cause to revisit this precedent." *Id.*

The landlords made free speech arguments in addition to their free exercise claims, but the Alaska Supreme Court held that the free speech arguments lacked independent merit. *Id.* at 945. Because the prohibited speech was a limitation on commercial speech preliminary to real estate transactions, prohibiting speech intended to discriminate would violate free speech rights only if prohibiting the underlying discrimination violated free exercise rights, a point that the landlords conceded. *Id.* & n.43. Therefore, since *Swanner* had already found that the laws did not violate the free exercise rights of a "virtually identical landlord," *id.* at 943, the free speech claims could prevail only if the court overruled that decision.

Because landlords Baker and Thomas are bound by the Ninth Circuit's determination that they have no Article III standing to bring these claims, they have not

joined with Bubna in filing the petition for certiorari in this case. Pet. at *ii* n.1.

REASONS FOR DENYING THE WRIT

This Court has no jurisdiction to decide the issues the petitioner asks it to consider. Two of the plaintiffs who brought this case are bound by a Ninth Circuit decision that they have no standing to bring these claims to a federal court; that is why Petitioner Bubna joined them in filing this case and alone petitions for certiorari. But Mr. Bubna has no better case for Article III standing than the two others had. Further, the Alaska Supreme Court based its decision solely on state law, so it is beyond this Court's jurisdiction to review, and it presents no conflict with other courts on federal issues.

I. The Petitioner in this Case Has Not Presented a Ripe Controversy Under Article III.

Although the Alaska Supreme Court found that the landlords have standing under its lenient state standards, *Thomas III*, 102 P.2d at 942, an en banc panel of the Court of Appeals for the Ninth Circuit had already determined that two of the three landlords did not meet the jurisdictional requirements of Article III, a decision that this Court declined to review. *Thomas II*, 220 F.3d at 1137-38, *cert. denied*, 531 U.S. 1143 (2001).

Kevin Thomas and Joyce Baker have previously challenged in federal court the same state and municipal laws at issue here. Claiming that the laws' prohibition on discrimination conflicts with their religious beliefs, they asked the federal court to enjoin the state and city from

ever enforcing the laws against them. *See Thomas I*, 165 F.3d at 697. Ruling that the landlords' constitutional claims should not have been decided on their merits, since the action was not ripe for judicial review, an en banc panel of the Ninth Circuit ordered the landlords' action dismissed. *Thomas II*, 220 F.3d at 1142.

While Petitioner Jeffrey Bubna did not participate in the federal court case, his claim is insufficient to invoke Article III jurisdiction for the same reasons the claims of the original plaintiffs were. Because he stands in the same position as Thomas and Baker, his claims would have been "dismissed at the outset" if the federal rules of justiciability applied in state court. *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 617 (1989).

Like Thomas and Baker, Bubna is a landlord who has challenged Alaska's anti-discrimination law based on a First Amendment free exercise of religion and free speech claim. App. 2, 4. Like Thomas and Baker, Bubna has not alleged that any prospective tenant has ever filed a complaint against him. *See* App. 1-16. Like Thomas and Baker, Bubna has not alleged that either the Alaska State Commission for Human Rights or the Anchorage Equal Rights Commission has ever initiated an investigation into his rental practices or commenced a civil enforcement action or criminal prosecution against him under the challenged laws. *Id.* As the Ninth Circuit en banc panel stated, "at this point the dispute is purely hypothetical and the injury is speculative." *Thomas II*, 220 F.3d at 1137.

Having been a landlord for 15 years without interference from the government, Bubna presents no ripe issue, and simply seeks an advisory opinion that the Alaska

Supreme Court erred in its decision in the *Swanner* case a decade ago, and that it erred in refusing to overrule *Swanner* in this case.

II. The Alaska Supreme Court Decided the Issue Presented in this Case Not as a Matter Of Federal Law, But Rather as a Matter Of State Law That This Court Has No Power To Review.

The landlords in this case challenged the state and municipal laws as violating their right to freely exercise their religion, but the Alaska Supreme Court had already rejected that challenge in *Swanner*. For that reason, in this case the Alaska Supreme Court based its decision only on its analysis of whether the case presented sufficient bases to reconsider *Swanner*. This inquiry is purely a matter of state law.

This Court does not review determinations of state law on appeals from state courts, since interpretations of state law by a state's highest court are binding upon the Court. *O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974). The Alaska Supreme Court did not consider any federal rights in its decision; it evaluated only whether the landlords' arguments were sufficient, under a state common law standard, to overrule an earlier decision. *See Thomas III*, 102 P.3d at 943 ("We will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent." (quoting *State, Commercial Fisheries Entry Com'n* v. *Carlson*, 65 P.3d 851, 859 (Alaska 2003)).

The petitioner seeks, in essence, to have this Court review the substance of the Alaska Supreme Court's decision issued 11 years ago. But since the Alaska Supreme Court refused to revisit the issues it decided in *Swanner*, this case does not present those matters for this Court's review. This Court cannot reverse the Alaska Supreme Court's decision not to reconsider the merits of *Swanner* because that is a matter of state law, and it cannot consider in this case whether the Alaska Supreme Court should have struck down the anti-discrimination laws in 1994, because *Swanner* became final when this court denied certiorari a decade ago. The petition therefore presents no issue of federal law for this Court to review.

III. This Case Creates No Conflict with Decisions of this Court, Federal Circuit Courts, or State Supreme Courts on the Application of *Smith* And *Lukumi*.

The petitioner argues that there is substantial disagreement among federal Circuit Courts and state supreme courts regarding the correct meaning and application of *Employment Division* v. *Smith*, 494 U.S. 872, and *Church of the Lukumi Babula Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993), and the general applicability and "hybrid rights" doctrines. Pet. at 20. Regardless of whether that is correct, the Alaska Supreme Court's decision in this case does not create a conflict with any of these courts, nor does it conflict with any decision of this Court.

This is because the Alaska Supreme Court did not decide in this case that the law is generally applicable and neutral, or that landlords challenging this statute did or did not present hybrid claims. Those are determinations

that the Alaska court made in 1994 in the *Swanner* case. 874 P.2d 274. This case cannot conflict with federal cases on matters that the court did not even address below.

Moreover, even *Swanner* does not conflict with those decisions. The Alaska court correctly held in *Swanner* that the law is generally applicable and neutral toward religion. *Id.* at 279-280. It applies equally to all landlords regardless of their religious beliefs. *See* AS 18.80.240(1), (2), (3), and (5).[2] Its purpose is to eliminate discriminatory

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[2] AS 18.80.240(1), (2), (3), and (5) provide:

It is unlawful for the owner, lessee, manager, or other person having the right to sell, lease, or rent real property

(1) to refuse to sell, lease, or rent the real property to a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

(2) to discriminate against a person because of sex, marital status, changes in marital status, pregnancy, race, religion, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of real property; however, nothing in this paragraph prohibits the sale, lease, or rental of classes of real property commonly known as housing for "singles" or "married couples" only;

(3) to make a written or oral inquiry or record of the sex, marital status, changes in marital status, race, religion, physical or mental disability, color, or national origin of a person seeking to buy, lease, or rent real property;

. . .

(5) to represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or to refuse to allow a person to inspect real property because of the race, religion, physical or mental disability, color, national origin, age, sex, marital status,

(Continued on following page)

practices in the housing rental market, not to target or suppress religious beliefs. *See Swanner*, 874 P.2d at 282. Under *Smith*, the landlords are not excused from compliance with Alaska's anti-discrimination law simply because it conflicts with practices based on their religious beliefs. This Court rejected this argument in *Smith*, because "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." 494 U.S. at 879 (quoting *Reynolds* v. *United States*, 98 U.S. 145, 166-67 (1879)).

The landlords argue that the exceptions in the law for married-only or singles-only housing somehow "devalue [the landlords'] religious conviction." Pet. at 15. The exceptions are applicable to all landlords, however, regardless of their religious beliefs or motivation. Moreover, not only are the exceptions neutral toward religion, they could actually *resolve* the landlords' concerns about renting to unmarried couples. If the landlords were to take advantage of the exception for married-only housing, they could designate their rental property as available only to married couples and easily follow the dictates of their religious beliefs without violating the law. *See Thomas III*, 102 P.3d at 945 ("The landlords do not assert that their religious beliefs compel them to rent to classes of tenants other than "singles only" or "married couples"; nor do they satisfactorily explain why they could not take advantage of this exception to mitigate any financial hardship they might otherwise experience by complying with the anti-discrimination provision.")

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change in marital status or pregnancy of that person or of any person associated with that person[.]

The landlords' claim that *Thomas III* conflicts on the "hybrid" issue also is incorrect. In *Employment Division* v. *Smith*, this Court provided that courts may exempt an individual from compliance with neutral laws of general applicability where the facts present a hybrid situation where a constitutionally protected right is implicated in addition to free exercise of religion. 494 U.S. at 881-82. The Alaska court's decision could not conflict with *Smith* or any other decision about hybrid claims, because it did not rule on hybrid claims in this case. In *Swanner*, the Alaska court acknowledged that while *Smith* had suggested an exception for hybrid claims, the landlord, Tom Swanner, did not allege a hybrid violation. *Swanner*, 874 P.2d at 280. And in this case, the Alaska court refused to reconsider *Swanner* because the landlords had failed to show that *Swanner* would have been decided differently if the landlord in that case *had* argued the hybrid theory. *Thomas III*, 102 P.3d at 943-44. This is particularly true in light of *Swanner*'s holding that compelling state interests supported the narrowly-tailored prohibition on discrimination. *Swanner*, 874 P.2d at 280-83 & n.9.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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